No. 02-1386

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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1. This case involves 47 U.S.C. 253(a), which provides that "[n]o State * * * regulation * * * may prohibit * * * the ability of any entity to provide any interstate or intrastate telecommunications service." It is common ground that Section 253(a) preempts state laws prohibiting private parties from providing telecommunications services. The question presented is whether it also should be construed to preempt a state law that denies the State's political subdivisions authority to provide telecommunications services. The court of appeals acknowledged that the rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), requires a clear state-

ment of congressional intent before a federal law like Section 253(a) could be construed to interfere with a State's allocation of political authority to its subdivisions. Pet. App. 6a, 7a. But the court held in this case that Section 253(a) satisfies that clear statement rule.

The petition for certiorari argues that the decision of the Eighth Circuit conflicts with the decision of the D.C. Circuit in *City of Abilene* v. *FCC*, 164 F.3d 49 (1999), and that two state supreme courts have also reached decisions that conflict with each other on the same point. See Pet. 9-12. The conflict in the circuits places the Federal Communications Commission (FCC) in a particularly difficult position, most notably in cases arising from States in the Eighth Circuit. See Pet. 13-14. In any such case, a decision by the Commission holding preempted a State law like the one in this case will likely be brought to the D.C. Circuit for review and then reversed under that court's decision in *City of Abilene*. Conversely, a decision by the Commission holding such a state law not to be preempted will likely be brought to the Eighth Circuit for review and reversed under the Eighth Circuit's decision in this case. The issue of preemption under Section 253(a) of laws of the sort at issue here is likely to recur. See Pet. 15 n.6. Accordingly, further review by this Court is warranted to resolve this particularly awkward conflict in the circuits and between two state supreme courts.

2. Respondents and their amici "acknowledge that the D.C. Circuit * * * and the Eighth Circuit * * * reached opposite conclusions about whether the term 'any entity' in Section 253(a) of the Telecommunications Act covers public entities"—the central issue in this case. Br. in Opp. 4; see City of Abilene, et al., Amicus Br. 2 ("It is undeniable that the decisions of the D.C. Circuit and the Eighth Circuit are in clear conflict.").

Respondents also acknowledge that "two state supreme courts in the Eighth Circuit * * * have divided over this question." Br. in Opp. 4. Respondents "agree [with the petition] that this is an important issue." *Id.* at 1. They do not disagree that the conflict in the circuits places the FCC in a particularly difficult position, especially for cases arising from States within the Eighth Circuit. And respondents do not dispute that the question presented will continue to arise.

3. In light of respondents' acknowledgements recited above, it appears that all parties agree that the ordinary bases for this Court's review are present in this case. There is a conflict in the circuits and between the highest courts of two States, the conflict poses a particular problem for the FCC in discharging its statutory responsibilities, and the question presented is an important one that is likely to continue to arise in the future. Respondents nonetheless argue that this Court should not grant further review in this case because, respondents contend, "it is questionable whether any court, including the D.C. Circuit itself, will follow [*City of] Abilene* in the future." Br. in Opp. 4. None of the bases offered by respondents in support of that contention are sound.

a. Respondents appear to argue (Br. in Opp. 4-14) that in the future the D.C. Circuit would depart from the rule the court adopted in its unanimous decision in *City of Abilene*, because two other recent decisions in the area have agreed with the Eighth Circuit's decision in this case. Regardless of the fact that some other courts have disagreed with its result, the D.C. Circuit is bound by *City of Abilene* and can be expected to follow that decision in future cases. In the D.C. Circuit, as elsewhere, panels of the court are bound to follow circuit precedents until the en banc court or this Court

overrules those precedents. *National Mining Ass'n* v. *Fowler*, 324 F.3d 752, 759 (D.C. Cir. 2003); *Brewster* v. *Commissioner*, 607 F.2d 1369, 1373-1374 (D.C. Cir.), cert. denied, 444 U.S. 991 (1979). The D.C. Circuit has explained that "[o]ne three-judge panel * * * does not have the authority to overrule another three-judge panel of the court," *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc), and a panel is "bound by [a prior] decision even if [the panel] did not agree with it," *United States* v. *Kolter*, 71 F.3d 425, 431 (D.C. Cir. 1995). Accordingly, regardless of any alleged "trend" in decisions in other courts, future panels of the D.C. Circuit are bound by the decision in *City of Abilene* and must apply it in the future.*

Moreover, respondents err in contending that there is any meaningful trend in the lower court decisions in this area. Respondents correctly count six decisions on the issue presented in this case in the last four years. The D.C. Circuit in *City of Abilene*, the Iowa Supreme Court in *Iowa Telephone Ass'n* v. *City of Hawarden*, 589 N.W.2d 245 (Iowa 1999), and an intermediate Georgia appellate court in *Municipal Elec. Auth.* v. *Georgia*

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* The D.C. Circuit without recorded dissent denied rehearing en banc in *City of Abilene*. *City of Abilene* v. FCC, No. 97-1633 (Mar. 11, 1999). Although it is theoretically possible that the D.C. Circuit sitting en banc could nonetheless some day overrule the decision that a unanimous panel of that court reached in *City of Abilene*, that remote and speculative possibility is not a sufficient basis to deny certiorari in light of the serious practical dilemma faced by the FCC while the circuit split subsists. Moreover, even an en banc D.C. Circuit reversal of *City of Abilene* would not eliminate the split in authority. Under the basic rule of stare decisis, it would be expected that the Iowa Supreme Court would in future cases follow its decision in *Iowa Telephone Ass'n* v. *City of Hawarden*, 589 N.W.2d 245 (Iowa 1999), which agreed with *City of Abilene*.

Pub. Serv. Comm'n, 525 S.E.2d 399 (Ga. Ct. App. 1999), cert. denied, No. S00C0601 (Ga. May 1, 2000), have all taken one view. The Eighth Circuit in this case, the Supreme Court of Nebraska in *In re Lincoln Electric System*, 655 N.W.2d 363 (2003), petition for cert. pending, No. 02-1599 (filed May 1, 2003), and a district court in *City of Bristol* v. *Earley*, 145 F. Supp. 2d 741, 746-750 (W.D. Va. 2001), have taken the opposite view. That, within a brief period, the three cases going in one direction were decided after the three cases going in the other does not evidence a meaningful trend. That the issue was the subject of decisions in six different jurisdictions over a relatively short period, however, does confirm that the issue is one that is likely to continue to arise in the future and thus warrants resolution by this Court. See Pet. 15 & n.6.

b. Respondents also contend (Br. in Opp. 9) that the D.C. Circuit would overrule *City of Abilene* if it faced the issue again, because—in respondents' view—*City of Abilene* "did not follow" this Court's decision in *Salinas* v. *United States*, 522 U.S. 52 (1997), and because the court in *City of Abilene* "did not attempt to reconcile its interpretation with the pro-competitive purposes of the Telecommunications Act." Those statements simply reflect respondents' view that *City of Abilene* was wrongly decided. Future panels of the D.C. Circuit are bound by *City of Abilene*, and will remain so bound regardless of respondents' views. Further review by this Court is the appropriate remedy to resolve the conflict in the circuits.

i. In any event, the D.C. Circuit in *City of Abilene* did not misconstrue or fail to follow *Salinas*. In that case, the Court held that a federal bribery statute precluding the acceptance of a bribe "in connection with *any* business [or] transaction" of a government agency

applies to bribes of local government officials that had no effect on federal funds. 522 U.S. at 57 (emphasis added). In reaching the conclusion that the scope of the statute was sufficiently clear, *id.* at 59-60 (citing *Gregory*), the Court relied not simply on the term "any," but also on the other terms of the statute, see *ibid.*, and on the enactment of amendments to the statute that would have made a narrower construction "incongruous," *id.* at 58-59. Congress used the term "any" in Section 253(a) in an entirely different context, surrounded by different statutory language and the result of a different process of amendment than in *Salinas*. Conclusions about the breadth of the statute at issue in *Salinas* therefore are not applicable to the very different statute at issue here.

Moreover, the bribery statute in *Salinas* did not implicate the full scope of the *Gregory* v. *Ashcroft* rule, because it did not place any limits on the internal organization of any state government—an issue that is "central to state self-government." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002). The statute at issue in this case does implicate a State's basic decisions about allocation of power to its political subdivisions. As this Court has recently made clear, the use of a modifier such as "any" in a statute that affects an analogous core state interest is *not* sufficient to satisfy the *Gregory* plain statement standard. See *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 542-546 (2002).

ii. Nor did the D.C. Circuit in *City of Abilene* fail to "reconcile its interpretation [of Section 253(a)] with the pro-competitive purposes of the Telecommunications Act." Br. in Opp. 9. Such general "purposes" could not override the *Gregory* rule, which precludes interfering with the internal structure of state government unless

it can be shown that Congress clearly intended to do so. The fact that Congress generally had a pro-competitive purpose in mind in framing many of the provisions of the Telecommunications Act of 1996 says nothing about whether, in the specific context of Section 253(a), Congress intended to preempt state laws that affect a State's decisions about what powers to allocate to its political subdivisions.

c. Respondents suggest (Br. in Opp. 15-16) that this Court's decision in *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), provides a basis for the D.C. Circuit to depart from *City of Abilene*. *AT&T Corp.* has no bearing on the question presented in this case, as demonstrated by the complete absence of any reference to or reliance on *AT&T Corp.* in the Eighth Circuit's opinion here. The critical issue in *AT&T Corp.* concerned whether Congress had authorized the FCC or state public utility commissions to write rules governing novel relationships between incumbent local exchange carriers and new competitors seeking access to the incumbents' networks. 525 U.S. at 377-386. The Court in *AT&T Corp.* had no occasion to address the scope of Section 253, and it had no occasion to consider any provision that addressed the internal organization of state government. *AT&T Corp.* accordingly could not provide the D.C. Circuit with a basis to depart from *City of Abilene* in a future case.

d. Respondents argue that the D.C. Circuit would overrule *City of Abilene* in a future case, because in respondents' view "the D.C. Circuit decided *Abilene* on the understanding * * * that the court's decision would not adversely affect the rights of municipal electric utilities." Br. in Opp. 17. Respondents assert that "[h]ad the D.C. Circuit anticipated that the FCC would subsequently insist that *Abilene* had indeed

disposed of the rights of municipal electric utilities," it "might well have viewed *Abilene* in a wholly different light" and "would undoubtedly" do so in the future. *Ibid.*

As noted above, the D.C. Circuit is bound by *City of Abilene*, regardless of respondents' argument. But respondents also are mistaken about the FCC's position. The FCC has never "insist[ed] that *Abilene* had * * * disposed of the rights of municipal electric utilities" in all circumstances. Br. in Opp. 17. If a municipally owned utility has no separate existence from the municipality itself, it should naturally be treated in the same way as the municipality under Section 253(a). But, as the FCC's order in this case explained, "if a municipally-owned utility has an independent corporate identity that is separate from the state, it *can* be considered an entity for which section 253 preemption is available." Pet. App. 16a (emphasis added). In short, even if future D.C. Circuit panels were free to depart from past circuit precedents, there is no basis whatever to conclude that the D.C. Circuit would depart from the rule of *City of Abilene* in a future case.

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For the reasons given above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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